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No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JACKSONVILLE SHIPYARDS, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

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No.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

JACKSONVILLE SHIPYARDS, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Director, Office of Workers' Compensation Programs, United States Department of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (App. A, *infra*, 1a-2a) is reported at 575 F.2d 79. The original opinion of the court of appeals (App. B, *infra*, 3a-31a) is reported at 539 F.2d 533.

The opinion of the Benefits Review Board (App. C, *infra*, 32a-36a) is reported at 1 B.R.B.S. 297. The decision of the administrative law judge (App. D, *infra*, 37a-60a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. E, *infra*, 61a-62a) was entered on June 16, 1978. A timely petition for rehearing was denied on August 30, 1978 (App. F, *infra*, 63a). On November 21, 1978, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to and including January 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the maritime situs requirement of the Longshoremen's and Harbor Workers' Compensation Act is satisfied when a maritime employee is injured in the course of employment within a large maritime facility, but at a place not itself used for the performance of maritime work.

STATUTE INVOLVED

Section 3(a) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 903(a), provides in part:

> Compensation shall be payable under this Act in respect of disability or death of an employee but only if the disability or death results from

> an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

STATEMENT

Respondent Herbert L. Perdue was employed as a shipfitter by respondent Jacksonville Shipyards, Inc. On February 2, 1973, he was working aboard the aircraft carrier U.S.S. ROOSEVELT, which was berthed at the Mayport Naval Station. Near the end of his shift, he left the aircraft carrier and caught a bus supplied by his employer to take him to the place where he would check out for the day. As he was alighting from the bus, Perdue fell and injured his knee (App. D, *infra*, 38a).

Jacksonville Shipyards paid Perdue from the time he checked in until the time he checked out. The company required him to check in and out at a small building just inside the entrance to the Naval Station. The building was approximately 500 yards from the water and approximately one mile by bus from where the ROOSEVELT was berthed. Perdue was acting in the course of his employment when he sustained his injury (App. D, *infra*, 38a, 48a).

Jacksonville Shipyards and its insurance carrier, respondent Aetna Casualty & Surety Company, resisted Perdue's claim for compensation under the Longshoremen's and Harbor Workers' Compensation

Act. They argued that Perdue was not an "employee" within the meaning of Section 2(3) of the Act, as amended in 1972, 33 U.S.C. 902(3), because he was not engaged in maritime duties at the moment he was injured. They also argued that the location of his injury did not satisfy the maritime situs requirement of Section 3(a), as amended in 1972, 33 U.S.C. 903(a).

The administrative law judge rejected the contention that Perdue lost his status as an "employee," within the meaning of Section 2(3), when he left the ROOSEVELT (App. D, *infra*, 48a). The administrative law judge nevertheless denied Perdue's claim for benefits, concluding that the building where Perdue was to check out for the day did not satisfy the maritime situs requirement of Section 3(a) (*id.* at 40a, 54a-58a).

The Benefits Review Board reversed (App. C, *infra*, 32a-36a). It agreed with the administrative law judge that Perdue, who was engaged generally as a ship repairman, did not lose his status as an "employee" the minute he stepped off the vessel (*id.* at 34a). It concluded, however, that the administrative law judge's interpretation of the situs requirement was too narrow and would frustrate the underlying objective of the 1972 amendment to the Act: to provide a uniform compensation system for covered employees (*ibid.*). The Board held that the building where Perdue was to check out was an "adjoining area" for purposes of Section 3(a) because it was a place frequented by Perdue in the course of his em-

ployment and maintained by Jacksonville Shipyards to facilitate its work of repairing vessels (*id.* at 34a-35a).

The court of appeals set aside the Board's order (App. B, *infra*, 17a-18a). In an opinion disposing of this and four other cases,[1] the court generally accepted the Board's definition of "employee" for purposes of Section 2(3). The court did not consider whether Perdue met the Act's status requirement as an "employee," however, because it held that Perdue was not injured in a place with the requisite maritime situs (*id.* at 15a-18a). It concluded that the requirement of Section 3(a) would be met only if "the situs is one 'customarily used by an employer in loading, unloading, repairing or building a vessel' " (*id.* at 15a); that requirement was not met here, the court found, because Perdue was injured outside a building far from the water's edge and used only for clerical purposes (*id.* at 17a-18a). On the Director's petition, this Court vacated the judgment of the court

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[1] The Court denied certiorari in one of the four other cases. *Halter Marine Fabricators, Inc.* v. *Nulty*, 433 U.S. 908 (1977). It granted certiorari and vacated the judgments in this case and in two of the other cases. All three were remanded for further consideration in light of *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977). *P. C. Pfeiffer Co.* v. *Ford*, 433 U.S. 904 (1977); *Director, Office of Workers' Compensation Programs* v. *Jacksonville Shipyards, Inc.*, 433 U.S. 904 (1977). As in this case, the court of appeals adhered to its original decision in both of the other cases without discussion. On November 27, 1978, certiorari was granted in those two cases. *P. C. Pfeiffer Co.* v. *Ford*, No. 78-425. Those cases do not involve the "situs" question presented by the instant case.

of appeals and remanded the case for further consideration in light of *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977). See 433 U.S. 904. On remand the court of appeals adhered to its original decision without discussion (App. A, *infra*, 1a-2a).

REASONS FOR GRANTING THE PETITION

1. The consistent position of the Director and the Benefits Review Board has been that every place within any waterfront facility devoted primarily to loading, unloading, building, or repairing vessels is a maritime situs for the purpose of Section 3(a) of the Longshoremen's and Harbor Workers' Compensation Act. That position has been upheld explicitly by two courts of appeals [2] and implicitly by every other court of appeals that has considered it.[3] The decision in the present case therefore creates a conflict among the circuits on an important issue concerning the shoreside coverage of the amended Act. Because many ports and shipbuilding facilities are within the juris-

[2] See *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 137, 141 (9th Cir. 1978); *Sea-Land Service, Inc.* v. *Director, Office of Workers' Compensation Programs*, 540 F.2d 629, 638 (3d Cir. 1976). See also *Dravo Corp.* v. *Maxin*, 545 F.2d 374, 381 (3d Cir. 1976), cert. denied, 433 U.S. 908 (1977).

[3] See *Newport News Shipbuilding & Dry Dock Co.* v. *Graham*, 573 F.2d 167, 169 (4th Cir. 1978), cert. denied, No. 77-1765 (Nov. 27, 1978); *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35, 51 n.19 (2d Cir. 1976), affirmed *sub nom. Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977); *Stockman* v. *John T. Clark & Son, Inc.*, 539 F.2d 264, 272 (1st Cir. 1976), cert. denied, 433 U.S. 908 (1977).

diction of the Fifth Circuit,[4] it is important that the Court grant review here.[5]

2. In *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), this Court held the Act applicable to two injuries. One occurred at the inland end of a large marine terminal, where consignees' trucks were loaded with imported cargo for overland transshipment. The Court held that the location was a maritime situs within the meaning of Section 3(a) of the Act " 'because the terminal adjoins navigable waters of the United States and parts of the terminal are used in loading and unloading ships.' " 432 U.S. at

[4] Approximately 30% of all compensable injuries under the Longshoremen's and Harbor Workers' Compensation Act occur in the Fifth Circuit.

[5] In *Texports Stevedore Co.* v. *Winchester*, 554 F.2d 245 (5th Cir. 1977), a panel of the Fifth Circuit appeared to adopt a broad construction of the situs test similar to the one urged by the Director and applied by the Board in the present case. The subsequent, and apparently contrary, decision of the panel in the present case is unexplained except by reference to the panel's original opinion. But the Fifth Circuit had granted rehearing en banc in *Texports* and heard argument shortly before its decision on remand in this case. In the expectation that the court's opinion en banc in *Texports* might well explain its disposition of this case, the Director sought rehearing in this case and requested that the petition be held until the decision in *Texports*. The court denied the petition for rehearing. We infer from this that the en banc disposition of *Texports* either will focus on some aspect of the situs test not involved in this case or will not support the position of the Director and the Board. We therefore believe that the conflict among the circuits is firmly established. If the Fifth Circuit should render a decision in *Texports* that casts light on the question presented by this petition, however, we will promptly advise the Court.

279.[6] The fact that the particular place within the terminal where the injury occurred neither adjoined the water nor was directly used in loading or unloading ships was not determinative.

The other injury occurred on a pier that was used not for loading and unloading but only for stuffing and stripping containers. The pier was part of a single fenced-in facility that included another pier that was used for loading and unloading ships. See 432 U.S. at 279. The Court held that the statutory situs test was satisfied because the injured employee was working in a terminal that was customarily used in loading and unloading. Even though the portion of the facility on which the employee was injured was not used for that purpose, the Court held the Act applicable because "[t]he entire terminal facility adjoined the water and one of its two finger-piers clearly was used for loading and unloading vessels" (432 U.S. at 281).

The same reasoning applies to the location of Perdue's injury. The timekeeper's office near which Perdue's injury occurred was part of a single fenced-in facility adjoining the water, and, like the terminal in *Caputo*, it was used for a maritime purpose, even if the precise part of the facility at which the injury occurred was not.

3. The court of appeals overlooked one of the major purposes of the 1972 amendments to the Act, the elimination of "the phenomenon of shifting coverage."

[6] The Court noted that there was no dispute on this point and quoted from petitioner's brief, which, the Court stated, had "correctly concede[d]" the situs issue.

Sea-Land Service, Inc. v. *Director, Office of Workers' Compensation Programs*, 540 F.2d 629, 638 (3d Cir. 1976). See *Northeast Marine Terminal Co.* v. *Caputo*, *supra*, 432 U.S. at 274, 276. Under the Fifth Circuit's rule, an employee engaged in the performance of maritime tasks would move in and out of the Act's coverage in the course of his regular working day on the waterfront, perhaps a number of times, as he moved to and from a vessel or from one part of a waterfront area to another. Congress attempted to eliminate just this kind of adventitious coverage. As both committee reports explained, "[t]he intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 10-11 (1972).

Perdue indisputably was a maritime worker; his only job was to repair vessels. He was engaged in those tasks throughout the day that he was injured. At the time of his injury he was performing one of the requirements of his employment. That should be enough to bring him within the coverage of the Act. The rule stated by the court of appeals would produce confusion and uncertainty by dividing a single maritime facility into many parts, some of which satisfy the Act's maritime situs requirement and others of which do not. Even worse, the maritime nature of a particular place might change from time to time during the day, depending on the tasks being

performed there at the time a maritime employee was injured. Unless the Act clearly compels the Board and the courts to engage in such a difficult locational calculus, they should not undertake it.

The Act does not establish the distinction created by the court of appeals. Section 3(a) speaks broadly of covering employees injured within "the navigable waters of the United States (including any adjoining * * * terminal * * * or other adjoining area customarily used by an employer in * * * repairing, or building a vessel)." The Mayport Naval Station, where Perdue was injured, adjoins the water where the ROOSEVELT was berthed for repair, and not only the Naval Station but even the very building where Perdue was injured is used by his employer for tasks that are an integral part of Perdue's job. See *Northeast Marine Terminal Co.* v. *Caputo, supra*, 432 U.S. at 280 n.42. It should make no difference whether Perdue's employer required him to check out on the wharf adjacent to the vessel or at a building farther away. It is enough that the Mayport Naval Station had a maritime situs, that Perdue was engaged in maritime employment, and that the employer's purpose in using the building was connected with that maritime endeavor.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1979

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 75-1659, 75-2289 and 75-4112

JACKSONVILLE SHIPYARDS, INC., and
AETNA CASUALTY & SURETY COMPANY,
PETITIONERS

v.

HERBERT L. PERDUE and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENTS

June 16, 1978

Petitions for Review of Orders of the Benefits Review Board.

Before TUTTLE, THORNBERRY and TJOFLAT, Circuit Judges.*

PER CURIAM:

These Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1970) (amended 1972), cases [1] are on remand from the Supreme

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* Judge Thornberry was a member of the panel that heard oral arguments but due to illness did not participate in this decision. 28 U.S.C. § 46(d) (1970).

[1] Five cases are contained in the decision of this court in *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F.2d 533 (5th Cir. 1976). The three cases involved in the present remand are *Jacksonville Shipyards, Inc.* v. *Perdue* (No. 75-1659),

Court with instructions to reconsider them in light of *Northeast Marine Terminal Co., Inc.* v. *Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977). We find that our prior resolution of the coverage issues presented in each of these cases is consistent with the rationale expressed in *Caputo*, and, accordingly, we reaffirm our prior determinations as to the benefit eligibility of the affected maritime employees under the Act.

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vacated and remanded, 433 U.S. 904, 97 S.Ct. 2967, 53 L.Ed.2d 1088 (1977); and *Ayers Steamship Co.* v. *Bryant* (No. 75-4112), which was consolidated with *P. C. Pfeiffer Co.* v. *Ford* (No. 75-2289), *vacated and remanded*, 433 U.S. 904, 97 S.Ct. 2966, 53 L.Ed.2d 1088 (1977).

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 75-1659, 75-2833, 75-2289,
75-2317 and 75-4112

JACKSONVILLE SHIPYARDS, INC., and
AETNA CASUALTY & SURETY COMPANY,
PETITIONERS

v.

HERBERT L. PERDUE and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, RESPONDENTS

Sept. 27, 1976

Petitions for Review of Orders of the Benefits Review Board, United States Department of Labor.

Before TUTTLE, THORNBERRY and TJOFLAT, Circuit Judges.*

TJOFLAT, Circuit Judge.

I

AN OVERVIEW OF THESE CASES

The Parties and Their Dispute. With these five vigorously contested appeals, petitioners and respondents join battle for the third time. Each individually

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* Judge Thornberry was a member of the panel that heard oral arguments but due to illness did not participate in this decision. 28 U.S.C. § 46(d) (1970).

named respondent is a shoreside worker who was injured in the course of his employment. These respondents claim that their injuries are covered by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act (the Act), 33 U.S.C. §§ 901 *et seq.* (1970). In their fight for coverage, the workers have a new and virtually untested weapon, *viz.*, those portions of the 1972 Amendments which expanded the scope of the Act.[1] They also have a powerful and articulate ally in the other respondent, the Director of the Office of Workers' Compensation Programs of the United States Department of Labor (the Director).[2] The forces arrayed against respondents consist of the workers' employers and the employers' insurance carriers.

Procedural History. In each of the cases, a preliminary skirmish was fought before an Administrative Law Judge.[3] Reports from these battlefields show

[1] Especially pertinent are new Sections 902(3) (definition of "employee"), 902(4) (definition of "employer"), and 903(a) (expanded situs provision in new Act). Despite the fact that more than three years have passed since the Amendment's effective date, litigation over the Act's new coverage is just now beginning to reach the courts. *See Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957 (9th Cir. 1975). *See also I. T. O. Corp.* v. *Benefits Review Bd.*, 529 F.2d 1080 (4th Cir. 1975), *rehearing en banc granted* (4th Cir. Mar. 12, 1976).

[2] As shall appear *infra*, there is a dispute as to whether the Director is a proper party respondent in this Court, or whether his status is merely that of *amicus curiae*. In Part V of this opinion, we hold that the Director is a proper respondent.

[3] New Section 919(d) provides that evidentiary hearings shall be held before hearing examiners. The administrative

mixed results; petitioners won three of the engagements, and respondents two. The theater of operations then shifted to the Washington, D.C., headquarters of the Benefits Review Board of the Department of Labor (the Board).[4] The Board adopted an extremely liberal view of the Act's coverage, and respondents swept to victory in all five cases. After losing the fight in Washington, D.C., petitioners chose to escalate the conflict by asking this Court to review the Board's decisions.[5]

The Issues on Appeal. Before this Court, the lines of battle have been drawn with admirable clarity and good sense. Both sides have declined to assume certain exposed legal positions where they would quickly fall prey to the enemy's fire. Thus, respondents concede that the five accidents would not have been covered by the pre-1972 Act. Similarly, petitioners concede that the 1972 Amendments have broadened

regulations relating to the Amendments make it clear that such hearing examiners are to be Administrative Law Judges. *See* 20 C.F.R. § 702.332 (1975).

[4] Pursuant to Section 921(b)(3) of the new Act, the Benefits Review Board is authorized to hear appeals by any party in interest from the Administrative Law Judge's orders. The Board must base its decision upon the hearing record and is bound by a "substantial evidence" standard in its review of findings of fact. *Id.*

[5] Jurisdiction over these appeals is conferred upon us by Section 921(c) of the new Act. Thereunder, a party aggrieved by a final order of the Board may obtain review of that order in the Court of Appeals for the federal judicial circuit in which the employee's injury occurred.

the Act's scope to include *some* shoreside injuries. The issue which divides the two camps is, of course, whether the Act was expanded far enough to reach *these* five injuries. We hold that the Board properly awarded benefits to two workers who were handling maritime cargo on shore, as well as to a carpenter who was fabricating parts for a new ship. However, the Board misconstrued the Act in extending coverage to the other two respondents, a shipboard worker who stumbled in front of his employer's office a mile from the ship, and an employee who was helping to tear down a shed in a disused marine repair facility.

Not content with merely jousting over the scope of the revised Act, three of the petitioners have broken ranks to seek out other *casus belli*. The petitioners in the *Halter Marine* case argue that the Act is unconstitutional if it covers injuries to shipbuilders on shore. In *Pfeiffer*, we are told that the Board violated the petitioners' right to due process by the method in which it awarded a fee to the claimant's attorney. The *Ayers Steamship* petitioners enter the lists with a plan to split the enemy forces; they claim that the Director is not a proper respondent in these appeals. As will hereinafter appear, we reject all of these additional contentions.

II

SCOPE OF THE 1972 AMENDMENTS

Of the many changes which Congress made in the Act in 1972, we are here concerned with only one: the

extension of the Act's coverage inland to reach certain maritime-related injuries. Under the prior Act, coverage was overwhelmingly situs-oriented. As a general rule, an employee's injury was compensable if it occurred "upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law . . .".[6] Interpretation of this provision was immensely complicated by a judicially created doctrine under which some "maritime but local" injuries could be covered by both state and federal compensation schemes. *See, e.g., Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962); *Davis* v. *Department of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942). However, the Supreme Court made it clear that, whatever the exact parameters of the "maritime but local" doctrine, the federal Act would generally be confined to injuries occurring over the waters. Thus, in *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212, 90 S.Ct. 347, 24 L.Ed.2d 371 (1969), the Court held that the Act did not cover injuries to longshoremen who were working on a pier permanently affixed to the shore. Coverage was denied despite the fact that the workers had been in-

[6] See former 33 U.S.C. § 903(a). There were certain exemptions from coverage, all of which have been carried over into the new Act. See *id., as amended,* § 903(a)(1) (masters and crew members; persons engaged by masters to service vessels under eighteen tons net); *id.* § 903(a)(2) (government employees); *id.* § 903(b) (injuries caused solely by the employee's intoxication or willful conduct).

jured while loading and unloading ships, an employment as maritime in nature as any land-based employment could be.[7] The inequities of this "water's edge" division between covered and non-covered work were a major factor behind the decision to expand the scope of the Act.[8]

Two of the Act's new sections are pertinent to the present appeals.[9] The first of these defines the status which the affected employee must occupy to bring his injury within the Act's coverage:

> The term "employee" means any person engaged in maritime employment, including any long-

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[7] Further underscoring the maritime context of these injuries was the fact that the injuries were caused by ships' cranes which had swung out of control. 396 U.S. at 213-14, 90 S.Ct. 347.

[8] *See* H.R. No. 92-1441, 1972 *U.S. Code Congressional & Administrative News* at 4707.

[9] None of the employers denies that it is an "employer" within the meaning of new Section 902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

In any event, it is clear that this section requires merely that an employer have at least one employee engaged in "maritime employment" (the requirement of new Section 902(3)'s definition of an "employee") on the situs defined in new Section 903(a). Thus, if a claimant can satisfy Sections 902(3) and 903(a), his employer is automatically brought within Section 902(4).

> shoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . 33 U.S.C. § 902(3).

The other provision describes the situs where a covered injury must occur:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). *Id.* § 903(a).

From these statutes, the general thrust of the new Act's coverage is clear. Congress has replaced the old "water's edge" analysis with a two-part test which requires (1) that the claimant have been engaged in "maritime employment" and (2) that the injury have taken place upon the situs specified in the Act.

The Act's definition of "maritime employment" is the focus of most of the legal controversy which rages in the parties' voluminous briefs. Unfortunately, much of this learned debate is of little relevance, if any, to the cases now before this Court. Counsel have drawn our attention to a host of pre-1972 decisions which discussed the meaning of the term "maritime employment" as used in the former Act. *See, e.g., Pennsylvania R. R.* v. *O'Rourke*, 344 U.S. 334, 73 S.Ct. 302, 97 L.Ed. 367 (1953); *Nalco Chemical*

Corp. v. *Shea*, 419 F.2d 572 (5th Cir. 1969). Under the old Act, as under the present one, an employer was liable if he had one or more employees engaged in "maritime employment".[10] However, judicial constructions of the pre-1972 Act were necessarily limited by the "water's edge" approach of that statute.[11] For this reason, these older cases simply do not speak to the issue of what land-based employment is sufficiently "maritime" to be covered by the new Act.[12] Fortunately, Congress itself has answered that question. The terms of the statute allow coverage for an injured employee who was working as a long-

[10] Compare old 33 U.S.C. § 902(4) with new 33 U.S.C. § 902(4). As we have indicated, *supra* note 9, the only way to read the new Act consistently is to give the words "maritime employment" in new Section 902(4) the same meaning as in new Section 902(3).

[11] Not only, as noted was the "water's edge" doctrine applied to the situs of the claimant's injury, but the "maritime employment" of the employer's workers was required to take place "upon the navigable waters of the United States (including any dry dock)". See old 33 U.S.C. § 902(4).

[12] The commendable diligence of counsel has uncovered some scattered dicta which might be read as suggesting the general nature of "maritime" work. *See, e.g., Pennsylvania R. R.* v. *O'Rourke, supra*, 344 U.S. at 339-40, 73 S.Ct. 302. These occasional pronouncements by the courts have, at best, only the most tenuous connection with the 1972 Amendments' extension of coverage to shoreside injuries. In comparison with the statutory language itself and the legislative history, the timeworn dicta which are urged upon us are entitled to little weight. Also, we note that none of the instant appeals involves an injury which occurred over the waters. Therefore, we need not, and do not, decide if the new Act made any changes in the coverage of such injuries.

shoreman, a ship repairman, a shipbuilder, or a shipbreaker.[13] The legislative history tells us that an injured employee will be covered if he was "engaged in loading, unloading, repairing, or building a vessel," [14] but will not be covered merely because he was injured in the area defined by new Section 903 (a).[15] In light of these indicia of Congressional intent, we must agree with the Court of Appeals for the Ninth Circuit that the new Act requires such a claimant to have been engaged in the work of loading, etc. *at the time of the injury. Weyerhaeuser Co.* v. *Gilmore*, 528 F.2d 957, 960 (9th Cir. 1975). We therefore reject respondents' contention that an employee's general job classification (such as "longshoreman" or "ship repairman") will bring him within the Act's coverage regardless of the nature of the work which he was performing when he was injured.[16] In its reports, Congress has also indicated the extent to

[13] 33 U.S.C. § 902(3).

[14] In light of the statutory language, we regard the omission of shipbreaking from this passage as inadvertent.

[15] "The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." H.R. No. 92-1441, 1972 *U.S. Code Congressional & Administrative News*, at 4708.

[16] For the same reason we also cannot accept the notion that the official name of an employee's union or the language of a union's jurisdictional agreement is dispositive of the issue of coverage. It is the employee's work at the time of the injury which controls.

which coverage should be granted to persons who are not themselves loading, unloading, repairing, building, or breaking a vessel but who are nevertheless performing closely related functions. Thus, the House Report states that a checker would be performing covered work if he was "*directly involved* in the loading or unloading functions . . .".[17] Our holding is that an injured worker is a covered "employee" if at the time of his injury (a) he was performing the work of loading, unloading, repairing, building, or breaking a vessel, or (b) although he was not actually carrying out these specified functions, he was "directly involved" in such work.[18]

We specifically reject a theory which petitioners in the *Pfeiffer* and *Ayers Steamship* cases advance as the proper rule for cargo handling operations. They claim that the Act's coverage depends upon whether cargo has reached its shoreside "point of rest", as that

[17] *Id.* (Emphasis supplied.) The same report also states that clerical employees who do not "participate in the loading or unloading of cargo" would not be covered by the new Act. *Id.*

[18] *See* Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments*, 6 Journal of Maritime Law and Commerce 1, 10 (1974). By this holding, we do not mean to suggest that future cases may not bring to light other types of covered work which cannot be characterized as loading, unloading, repairing, building, or breaking, and which are not "directly involved" with these five types of work, but which nevertheless are sufficiently similar to fall within the Congressional scheme. No such additional category of covered work appears in the cases before us, but we will not foreclose the possibility of such categories arising in future litigation.

term is used in the maritime industry.[19] To these petitioners, men who are handling cargo on its way to a vessel are not covered by the Act until that cargo reaches its last marshaling area prior to being taken on board a ship. Similarly, under this theory men who are unloading cargo from ships are performing covered work only until they reach the first marshaling area for cargo on shore. We are unable to find any support for such a hypertechnical construction of the 1972 Amendments.[20] In our view, if Congress had wished to adopt the "point of rest" as the test for coverage, it would have made that intention clear. As it is, the "point of rest" analysis is to be found neither in the statute itself nor in the legislative history. The closest approach to such a test appears in the following passage from the House Report:

> To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters.

[19] The Federal Maritime Commission has defined the "point of rest" as follows:

> For the purpose of this section, "point of rest" shall be defined as that area on the terminal facility which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargo from shippers for vessel loading. 46 C.F.R. § 533.6(c) (1975).

[20] A narrowly technical construction of the Longshoremen's and Harbor Workers' Compensation Act has traditionally been disfavored. *See, e.g., Luckenbach S.S. Co.* v. *Norton*, 106 F.2d 137, 138 (3d Cir. 1939).

> The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area . . . [E]mployees whose responsibility is only to pick up stored cargo for further transshipment would not be covered . . . H.R. No. 92-1441, 1972 *U.S. Code Congressional & Administrative News*, at 4708.

In our opinion, these remarks establish no more than that workers who bring cargo to a storage area from on board ship are covered, while those persons (generally truckers or railroad personnel) who merely receive cargo and transport it inland are not covered. The House Committee in this passage did not even mention those employees who handle cargo between the first holding area and the cargo's departure via land transportation. It is precisely the treatment of this intermediate group of workers with which we are here concerned, and this passage is totally silent as to them. Elsewhere, as we have seen, the Committee indicated that employees who are directly involved in loading or unloading will be covered by the new Act. In the absence of explicit language which would establish a "point of rest" dividing line for shoreside cargo handlers, we will apply this general test to them as well.[21]

[21] In deciding how to interpret the Amendments and their legislative history, we have remembered that this Act is to be liberally construed in favor of injured employees. *See Voris v. Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953). In our view, this principle requires us to resolve doubts as to the new Act's coverage in favor of a particular group of workers such as cargo handlers landward of the "point of rest".

Brief mention should also be made of the House Committee's announced intention "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity", H.R. No. 92-1441, *supra*, at 4708. We agree that here the Committee was speaking of one inequity of the old "water's edge" approach, under which cargo handlers would walk in and out of coverage as they moved between ship and shore. However, we see no reason to treat this statement as a comprehensive description of the new Act's coverage, with the result that only those workers who spend part of their days upon the waters would be covered. In this passage, the Committee was merely addressing itself to one anomaly which it wished to eliminate. The same paragraph clearly states that checkers would be covered by the new Act, and the Committee gave no indication that coverage would depend on whether the checkers went on board ship. The test, rather, was to be whether they were "directly involved in the loading or unloading functions". *Id.*

Our interpretation of the new situs provision follows the same general lines as our construction of Section 902(3). Just as we choose to ignore the labels which an employer or a union has bestowed upon an employee, and instead rely upon the employee's work function at the time of the injury, likewise we will look past an area's formal nomenclature and examine the facts to see if the situs is one "customarily used by an employer in loading, unloading, repairing or building a vessel." The clear statutory scheme is to cover employees who are injured while performing certain types of work in an area which is customarily used for such work. Whether or not an employer or local custom has decided to designate an area as a "terminal", for example, is not dispositive of the situs issue. We will require that a putative situs

actually be used for loading, unloading, or one of the other functions specified in the Act. As with the "maritime employment" test, we also interpret the Act as requiring that the situs meet the statutory requirements as of the time of the injury. It will not suffice if the area was so used only in the past, or if such uses are merely contemplated for the future.

III

THE COVERAGE ISSUE IN THESE APPEALS

With the general tests for the amended Act's coverage in mind, we now turn to the specific facts of each of the present cases. In deciding each appeal we must remember that the Act is to be liberally construed in favor of injured workers, *see Voris* v. *Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953). We are also bound by a statutory presumption that an individual claim comes within the Act's coverage. 33 U.S.C. § 920(a). Finally, we will not set aside an award made by the Benefits Review Board so long as it is supported by substantial evidence on the record considered as a whole, and so long as there is a reasonable legal basis for the Board's conclusions. *See O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508, 71 S.Ct. 470, 95 L.Ed. 403 (1951); *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U.S. 469, 478-79, 67 S.Ct. 801, 91 L.Ed. 1028 (1947).[22]

[22] Although these cases were decided under the old Act, which provided for administrative adjudication by a deputy commissioner and for judicial review by a United States District Court, petitioners have offered no reason why the standard of review should be different under the present Act.

A. *No. 75-1659.* Herbert Perdue was employed by Jacksonville Shipyards, Inc., as a shipfitter. On February 2, 1973, he performed repair work for a twelve-hour shift (7:00 a.m. to 7:00 p.m.) abroad an aircraft carrier which was berthed at the Mayport Naval Station in Jacksonville, Florida. At the end of his working day, Perdue took a bus to an office which his employer maintained approximately one mile from the carrier. The bus was provided by Perdue's employer, and the office was the place where Perdue had to "punch out" on a time clock before and after each shift. While alighting from the bus near the office, Perdue stumbled and injured his left knee in a fall upon the pavement. In our view, the Board should have sustained the Administrative Law Judge's determination that Perdue was not injured on a situs defined by new Section 903(a). There is literally nothing in the record to support a conclusion that the employer's office was on the navigable waters or in an "adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." The vessel upon which Perdue was working was a mile away, and the "punch out" office was a purely clerical and administrative post separated from the waters by other facilities which likewise were not used for loading, unloading, ship repair, or shipbuild-

ing.[23] Under no reasonable construction of the Act did this area either "adjoin" the waters or carry out any of the functions specified in Section 903(a). We reject the argument that the new Act covers every point in a large marine facility where a ship repairman might go at his employer's direction. In the words of the Administrative Law Judge below, the locus of this injury had "nothing to do with loading, unloading, building or repairing vessels" (Appendix at 19). Therefore we must reverse the Board's determination that Perdue is entitled to compensation under the new Act.

B. *No. 75-2833.* Charles W. Skipper was another employee of Jacksonville Shipyards, Inc. For many years, he had been primarily engaged in ship repair work as a welder and burner. On the morning of February 8, 1974, Skipper reported for work as usual. However, instead of being assigned to his normal duties as a ship repairman, he was sent across the St. Johns River to a disused marine facility called the Southside Yard. There, he was to assist in tearing down a building which had formerly housed a fabrication shop. The purpose of dismantling this structure was to salvage some steel for use in constructing a plant which would manufacture sandblasting equipment. The activities of Jacksonville Shipyards, Inc., are quite diversified, and the contemplated plant was a new business venture. Skipper himself had pre-

[23] The parties have stipulated that the nearest body of water was 500 yards away from the office.

viously from time to time been assigned work, such as this salvage operation, which did not involve ship repair. On the day in question, Skipper was injured when some beams fell from the structure during the dismantling process and several steel fragments struck his forehead. At the time of the injury, all of the shops in the Southside Yard were closed, and no repair or fabrication work was being carried out there. Occasionally, ships would still be tied up at the pier in the Southside Yard, and repairmen or other workers would be sent from the employer's active facilities to work on these ships. However, such work would have no relationship to the various disused facilities in the Southside Yard, including the former fabrication shop in question, which was located between one hundred fifty and two hundred feet from the water. On these facts, we perceive no basis for the conclusion below that Skipper's injury is compensable under the new Act. Under no reasonable view was Skipper performing ship repair work at the time of his injury, nor was he carrying out any other of the types of work which the statute specifies as "maritime employment". We further hold that this salvage gang was not engaged in any work sufficiently similar to the statutory categories to be seen as a type of shoreside employment which was fairly within Congress' intent despite not being named in the 1972 Amendments. As we have already indicated, we refused to attach controlling weight to an employee's regular job classification. Therefore, we will not consider Skipper a "ship repairman" under Section 902(3)

merely because he normally performed ship repair work. We look only to his duties at the time of the injury, and these were decidedly not within the contemplation of the statute.

It is equally clear that Skipper was not injured on a situs as defined in new Section 903(a). We have held that under Section 903(a) a covered situs must be "customarily used by an employer in loading, unloading, repairing, or building a vessel" *as of the time of the injury.* In this case, the Southside Yard shops had been inactive for approximately a year when Skipper was injured. No repair work or any other work specified by the statute was being performed in these buildings. Therefore, we must conclude that the former shops had lost their status as ship repair or shipbuilding facilities, and that Skipper was not injured on a Section 903(a) situs.

Because we reverse the administrative finding of coverage under the Act, we need not reach the other issues discussed by the parties, such as the propriety of the award which Skipper received for a facial scar and the various requests which the claimant's lawyers have made for attorneys' fees.

C. *No. 75-2289.* In this case, the parties agree that the situs of the injury was within the contemplation of new Section 903(a), and the only dispute is whether the claimant was performing covered work. On April 12, 1973, Diversion Ford was injured at the port of Beaumont, Texas, while helping to secure a military vehicle to a railway flat car in preparation for its transportation inland. The vehicle in question

had arrived either two or seventeen days prior to the date of the accident. Since then, it had remained in the immediate waterfront area. On the day before the injury, a gantry crane at the water's edge had lifted the vehicles onto the flat cars. Ford's work of fastening the vehicles to the flat cars was therefore the last step in transferring this cargo from sea to land transportation. On the other hand, the vehicles were not moved directly from the ship to the flat cars but instead were taken first to a storage area. There is no dispute, then, that the "point of rest" for these vehicles had intervened since their arrival in port. However, we have today chosen not to adopt the "point of rest" theory of coverage for shoreside cargo handlers. In addition to the general reasons which we have already given for our conclusion, we cannot overlook the injustices which the proposed test would create in a case like this one. Petitioners apparently concede that Ford would be covered if his work were part of a continuous operation which began with the cargo's departure from a ship's hold. As respondents correctly point out, we are being asked to deny coverage purely because of a discontinuity in time created by the cargo's having been stored for a while along the shore. In contrast, under the test which we have adopted a shoreside worker like Ford would be covered if he was directly involved in "longshoring operations" such as unloading a ship. The work which Ford was performing was evidently an integral part of the process of moving maritime cargo from a ship to land transportation. Accordingly, we perceive

an ample basis for the Board's determination that Ford was performing covered work, and we therefore affirm that decision.[24]

D. *No. 75-2317.* On July 30, 1973, John L. Nulty was employed as a carpenter at a shipyard in Moss Point, Mississippi. At the time of his injury, Nulty was building a piece of woodwork which was to be installed in a new ship that had been launched but not yet commissioned. The ship was berthed about 300 feet from the fabrication shop where Nulty was working. The part which Nulty was fabricating was designed to hold a spare wheel on board the new ship. Most of Nulty's work was performed in the shop, although at times he would go on board a vessel to take measurements, or to install or repair some woodwork. The parties agree that a fellow employee known as a "shipfitter" would have picked up and installed the item which Nulty was building when he was injured. Under these facts, the Administrative Law Judge and the Benefits Review Board found that Nulty was working as a "shipbuilder" at the time of his injury and thus satisfied Section 902(3)'s definition of covered work. In our view, the only reasonable conclusion is that Nulty was directly involved in an ongoing shipbuilding operation. Under the test which

[24] Petitioners' briefs are rich in references to the title of Ford's union (which was the "warehousemen's" rather than the "longshoremen's" union) and to the jurisdictional agreement between the two unions. As we have already indicated, we do not regard such matters as dispositive; instead, we look to the duties which a claimant was performing at the time of his injury.

we have adopted, then, Nulty is entitled to compensation under the new Act. We accordingly affirm the Board's finding of coverage.

E. *No. 75-4112.* On May 2, 1973, Will Bryant was injured while working as a "cotton header" in a warehouse immediately adjacent to a pier in Galveston, Texas. At the port of Galveston, loads of cotton are first deposited at various shoreside warehouses by the inland shippers. The cotton is then placed upon dray wagons and taken to pier warehouses such as the one where Bryant was injured. The work performed by Bryant and other "cotton headers" is to unload the bales of cotton and stack them in pier warehouses. Two local unions, known to many as "cotton header's" and "longshoremen's" locals, have strictly divided waterfront operations between them. Generally, the cotton remains in these warehouses until other employees from the "longshoremen's" union take it on board ship. This storage period may last from less than one day to several weeks, although the average interval is about one week. At times, the cotton will be moved from one pier warehouse to another before being taken to a ship. In such cases, dray wagons are again used to carry the cotton, and "cotton headers" unload these wagons at the receiving warehouse. Occasionally, the cotton is moved directly from a dray wagon to a ship, in which event the work is performed solely by "longshoremen". The cotton which Bryant was handling at the time of his injury remained in the same warehouse for five days before "longshoremen" arrived to take the cargo

aboard a vessel. On these facts, we affirm the Board's conclusion that the injury sustained by Bryant is within the Act's coverage. The situs was a pier-side warehouse in which cotton is stored temporarily before being taken on board ships. Usually, the cargo is taken directly from the warehouse to a ship. It is clear that Bryant was working on a waterfront area "customarily used by an employer in loading . . . a vessel", and that therefore the requirements of Section 903(a) are met. We also will not set aside the Board's determination that Bryant was performing the work of an "employee" as defined in Section 902(3). We have already noted the established principle of liberal construction of this Act, and the statutory presumption that a claim is within the Act's coverage. Also, we are bound to respect the Board's conclusions if they are supported by the record and if they have a reasonable legal basis. In view of the limited nature of our review, we cannot say that the Board erred in defining Bryant's work status. As we here reiterate, we reject the notion that a "point of rest" such as the pier-side warehouse in this case marks the division between covered and uncovered work. We have no doubt that Bryant would be directly involved in "longshoring operations" if, instead of setting the cargo down, he had handed it to a "longshoreman" for immediate loading on board a ship. The brief discontinuity in time created by the cotton's temporary storage did not alter the essential nature of Bryant's work, which was an integral part of the ongoing process of moving cargo between land transportation and a ship. Clearly, there is adequate

support for a conclusion that Bryant was directly involved in "longshoring operations" and therefore falls within the terms of Section 902(3). Thus, we affirm the Board's decision that the injury in this case is covered by the new Act.[25]

IV

A CONSTITUTIONAL QUESTION

It is earnestly argued by Halter Marine Fabricators, Inc., and its insurance carrier that the new Act is unconstitutional insofar as it extends coverage to shipbuilding employees who are injured on land. We are reminded that traditionally a contract to build a ship has not been considered to be within the admiralty jurisdiction,[26] and that admiralty has traditionally included only those torts which occur upon the waters.[27] In the *Halter Marine* case, the employee was injured while working on land in furtherance of a shipbuilding operation. Therefore, we are told, Congress has exceeded the fixed boundaries of admiralty jurisdiction by covering work under a nonmaritime contract which is performed on a situs out-

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[25] Once again, we refuse to base our decision upon the designations of the two waterfront unions as "cotton header's" and "longshoremen's" or upon the terms of their jurisdictional agreements. Compare note 24, *supra*.

[26] *See, e.g., Thames Towboat Co.* v. *The Francis McDonald*, 254 U.S. 242, 243, 41 S.Ct. 65, 65 L.Ed. 245 (1920).

[27] *See, e.g., Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972).

side the scope of traditional tort jurisdiction. In essence, the argument is that the sum of traditional admiralty tort and contract jurisdiction defines the absolute limits within which Congress may legislate under the Admiralty Clause.[28] We disagree with this proposition. No authority supports the notion that, in enacting a uniform compensation scheme for waterfront employees, Congress must find a "contract" or "tort" peg upon which to hang its legislation. The true analysis to be applied to such statutes is quite different. It must begin with the long-standing judicial recognition of Congress' broad powers to expand the reach of admiralty jurisdiction. Contrary to the impression created by petitioners' briefs, such judicially authorized expansion has often been geographical in nature. *See, e.g., The Genesee Chief*, 12 How. 443, 13 L.Ed. 1058 (1851), *overruling The Thomas Jefferson*, 10 Wheat. 428, 6 L.Ed. 358 (1825) (abandoning former limitation of admiralty jurisdiction to the tidewaters). The cases which approve the many changes which Congress has made in admiralty jurisdiction are replete with statements such as the following:

> The authority of the Congress to enact legislation of this nature [the Ship Mortgage Act, 46 U.S.C. §§ 911 *et seq.*] was not limited by previous decisions as to the extent of the admiralty jurisdiction. We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned . . . *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21, 52, 55 S.Ct. 31, 41, 79 L.Ed. 176 (1934).

[28] Art. III, Section 2 of the Constitution extends the federal judicial power "to all Cases of admiralty and maritime Jurisdiction . . ." This clause has always been construed as empowering Congress to legislate in maritime matters. *See, e.g., Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 361, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959).

The Supreme Court has also consistently followed the view that this Congressional power "permits of the exercise of a wide discretion". *Panama R.R.* v. *Johnson*, 264 U.S. 375, 386, 44 S.Ct. 391, 394, 68 L.Ed. 748 (1924). Our conclusion is that, in the exercise of its discretion, Congress could properly determine that "new conceptions of maritime concerns" justified the extension of compensation coverage to workers in the immediate waterfront area who participate in an ongoing shipbuilding operation. As the legislative history makes clear, Congress was concerned that under the former Act maritime workers were covered over the waters but not covered while performing similar or related work on shore. The inequities of the pre-1972 Act in this regard are obvious, and we feel that this concern was a legitimate reason for Congress to exercise its discretion. We also feel that this concern was a "maritime" one within the meaning of the Admiralty Clause. We have already indicated that, in defining "maritime" concerns, we will not be limited by the rules which apply to tort and contract litigation. In the present case, we are not consider-

ing whether Congress would authorize suits upon shipbuilding contracts or whether land-based torts could be made actionable by an admiralty statute.[29] We deal only with the case before us, and in our view Congress could reasonably have felt that shipbuilding employees beside the navigable waters were performing a sufficiently maritime function to be covered by a revamped harbor workers' compensation statute. We therefore cannot conclude that Congress exceeded its broad discretion by extending coverage to such work.[30]

V

DIRECTOR A PROPER RESPONDENT

This issue is before the Court in rather an odd fashion. In their main brief on appeal, the *Ayers Steamship* petitioners allege that the Director of the Office of Workers' Compensation Programs, United States Department of Labor, is not a proper respondent in this Court, although he could appear as *amicus curiae*. We decline to consider the merits of this contention. First, we note that petitioners have never moved to dismiss the Director as a respondent. In our view, the relief which petitioners seek—dismissal of the Director as a party and addition of him as

[29] *See* 1A *Benedict on Admiralty* § 94, at 5-15 (6th ed. 1973).

[30] Because of our disposition of this issue, we need not reach the question of whether the 1972 Amendments were an exercise of Congress' power under the Commerce Clause as well as under the Admiralty Clause.

amicus curiae—is properly requested by a motion pursuant to Rule 27 of the Federal Rules of Appellate Procedure. Under that Rule, a motion is the appropriate vehicle for making "an application for an order or other relief", a category which clearly includes the request which petitioners have made for the first time in their brief. Furthermore, even assuming that petitioners have adequately raised this point, we cannot overlook the fact that in the two *Jacksonville Shipyards* cases another panel of this Court has granted motions by the Director to be added as a party respondent. These legal determinations that the Director may properly appear as a respondent must be respected by this Court. As a general rule, one panel cannot overrule the precedents set by another panel, absent some intervening factor such as a new controlling decision of the Supreme Court. *See Davis* v. *Estelle*, 529 F.2d 437, 441 (5th Cir. 1976). No such factor is present in this case, and we will therefore allow the Director to remain before this Court as a respondent.

VI

DUE PROCESS

In the *Pfeiffer* case, the Benefits Review Board awarded an attorney's fee to counsel for the successful claimant. The fee covered only the work which was performed before the Board, and the manner of its award was as follows. Pursuant to the applicable

regulation,[31] counsel presented his request for an attorney's fee, supported by a complete statement of the services which had been performed. Finding a fee of $1,000 to be "fair and reasonable for the work done in connection with these appeals", the Board approved an award in that amount, remanding the case to the Administrative Law Judge for determination of a fee for counsel's services at that level. Petitioners opposed the award, arguing that counsel had not "properly proved" the reasonableness of the fee and that petitioners should have an opportunity to offer evidence and to cross-examine counsel on the amount of his fee. The evidentiary hearing which they requested was alleged to be a requirement of the Fifth Amendment's Due Process Clause. The board rejected these arguments, and so do we. Government officials are, of course, required to minimize the risks of error and unfairness in the procedures by which one is deprived of life, liberty, or property. *See, e.g.*, *Goss* v. *Lopez*, 419 U.S. 565, 581, 95 S.Ct. 729, 42 L. Ed.2d 725 (1975); *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 609-10, 618, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974). We feel that these risks were adequately minimized by the procedures which the Board followed. The Board was clearly able to evaluate the services which counsel performed before it. It was the Board which read counsel's briefs and observed his representation of the claimant in the administra-

[31] 20 C.F.R. § 702.132 (1975). The statutory basis for this regulation is 33 U.S.C. §§ 928(a) & (c), *as amended.*

tive appeal. Thus, the fee which the Board granted was carefully limited to those services of which it had first-hand knowledge. Especially in view of the extremely generalized nature of petitioners' attack upon the fee's reasonableness, we cannot say that disposing of petitioners' objections without an evidentiary hearing was a violation of the Due Process Clause.

VII

CONCLUSION

For the foregoing reasons, the decisions of the Benefits Review Board in Nos. 75-1659 and 75-2833 are REVERSED. The Board's decisions in Nos. 75-2289, 75-2317 and 75-4112 are AFFIRMED in all respects.

APPENDIX C

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
Washington, D.C. 20210

BRB No. 74-200

Filed as part of the record Jan. 31, 1975
Carolyn D. McCready (Clerk)
Benefits Review Board

HERBERT L. PERDUE, CLAIMANT

v.

JACKSONVILLE SHIPYARDS, INC.

and

AETNA CASUALTY & SURETY CO.,
EMPLOYER/CARRIER-RESPONDENTS

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

DECISION

Appeal from Decision and Order of Administrative Law Judge Edwin E. Bernstein, U. S. Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members

Hartman, Member:

This is an appeal by the Director, Office of Workers' Compensation Programs, from a decision and order (74-LHCA-58) of Administrative Law Judge Bernstein denying compensation benefits pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereafter referred to as the Act).

In 1973, the claimant was working as a shipfitter aboard a vessel berthed at a naval station on a twelve hour shift. The claimant was required by the employer to "punch in and out" at a time clock in an office maintained by his employer within the naval station. The office was located approximately one mile by land from the ship on which he was working and approximately 500 feet from navigable water. The employer provided a bus to transport employees, such as the claimant, between this office and their work sites. The claimant injured his knee while disembarking from the bus at the end of his shift in order to "punch out".

The employer did not controvert the causal connection between the injury and the employment or the extent of the injury, but rather alleged that the injury was not covered by the provisions of the Act.

The administrative law judge, while finding that the employer and employee were covered under Sections 2(3) and 2(4) of the Act, 33 U.S.C. §§ 902(3) and 902(4), nevertheless rejected the claim finding that the injury did not occur on navigable waters as required by Section 3(a) of the Act, 33 U.S.C. § 903 (a).

The Director appeals alleging that the injury, occurring in the course of employment and within the confines of the naval station, is within the coverage of the amended Act. The issue on appeal, therefore, is whether the location where the injury occurred comes within the scope of Section 3(a) of the Act.

The Board agrees with the Director. The claimant was found by the administrative law judge to have been engaged in employment covered by the Act. An integral and essential part of that employment, as required by the employer, was "punching out" at the end of a shift at a specified location.

Section 3 of the Act was amended in 1972 to expand coverage shoreward to include employees defined in Section 2(3) of the Act who were injured in "any adjoining area customarily used by an employer in . . . repairing, or building a vessel." This was intended to avoid the inequities of coverage by an employee walking into and out of the scope of the Act during the workday. *Herron* v. *Brady Hamilton Stevedore Co. and Firemen's Fund Insurance Co.*, BRB No. 74-171 (January 23, 1975).

The administrative law judge's conclusion that the office containing the punch clock was not such an area customarily used by the employer is not well founded. The Board views this location as comprising an area in which an essential and integral part of claimant's employment took place. Distance from navigable waters alone is not determinative of coverage, but rather all of the circumstances surrounding

the employment at the time of the injury must be considered.

This Board will not narrowly construe "adjoining area" to restrict the situs of an injury to an area immediately adjacent to navigable waters. *Adkins* v. *I.T.O. Corp.*, 1 BRBS 199, BRB No. 74-123 (November 29, 1974). Here, the office was directly related to ship-repairing and was an integral part thereof. To hold otherwise would imply that the claimant, found to be an employee within the definition of Section 2(3) of the Act at the time of his injury, would be covered by the Act for only a part of the employment during his working shift. The Board finds, therefore, that the claimant is entitled to coverage under the Act.

The Director further alleges that the administrative law judge erred in his computation of the amount of time lost by the claimant as a result of the injury. The Director argues that the claimant was working a five day work week, not a seven day work week as found by the administrative law judge. The Board does not decide this matter but directs that such be considered and resolved by the administrative law judge.

The decision and order appealed from is reversed and the case is remanded to the Office of the Chief Administrative Law Judge for the appropriate entry of an award of compensation under the Act.

RALPH M. HARTMAN
Ralph M. Hartman, Member

We Concur: RUTH V. WASHINGTON
Ruth V. Washington, Chairperson

JULIUS MILLER
Julius Miller, Member

Dated this 31st day
of January, 1975

APPENDIX D

CASE NO. 74-LHCA-58

[FORMERLY 6-12085]

In the matter of
HERBERT L. PERDUE, CLAIMANT

vs.

JACKSONVILLE SHIPYARDS, INC., EMPLOYER
AETNA CASUALTY & SURETY COMPANY, CARRIER

Before: EDWIN S. BERNSTEIN
Administrative Law Judge

DECISION AND ORDER

Pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* ("the Act"), a hearing of the above matter was held before me in Jacksonville, Florida, on May 21, 1974. Claimant elected to appear without counsel and represented himself. The Employer and Carrier ("Respondents") were represented by counsel. Both parties were afforded a full opportunity to adduce evidence, to call, examine and cross-examine witnesses, and to submit briefs and proposed findings. The parties stipulated to facts. Claimant was the only witness. Upon the record and my study of the applicable law, I make the following determinations and order.

Findings of Fact

In accordance with the stipulation of the parties, I find the applicable facts to be:

1. On February 2, 1973, Claimant was employed as a shipfitter by Jacksonville Shipyards, Inc. On that day he performed repair work aboard the USS Roosevelt, an aircraft carrier, which was berthed at Mayport Naval Station in Jacksonville, Florida. His working hours were from 7 a.m. to 7 p.m. After completing work on the ship, he was transported from the pier by a bus under the control of the Employer to an office maintained by the Employer where he would "punch out" on a time clock at the end of his shift. While alighting from the bus near the office, he stepped onto an unlevel portion of ground, fell, and injured his left knee. The place where the injury occurred was located at Mayport Naval Station but was approximately 500 yards from the nearest body of water and approximately one mile from the USS Roosevelt where Claimant had been working.

2. The Respondents contend that the injury is covered by the Florida State Workmen's Compensation Act and not by the Longshoremen's and Harbor Workers' Compensation Act. Claimant disputes this contention. Whether or not this claim is within the jurisdiction of the Act is the sole issue in this case.

3. The parties agree and I find:

(a) As a result of the accident, Claimant was temporarily totally disabled for 12-2/7 weeks after the accident and sustained a permanent partial injury equal to a 5% scheduled loss of one leg.

(b) Claimant is entitled to be paid $60 per week under the State Act and $100 per week under the Federal Act.

(c) Respondents have paid compensation to Claimant as follows under the State Act:

(1) 12-2/7 weeks of temporary total disability payments at $66 per week	$ 818.40
(2) For 5% loss of a leg (loss of leg = 200 weeks) or 10 weeks at $66 per week	660.00
	$1478.40

(d) Should the Federal Act apply, Claimant must be compensated as follows:

(1) 12-2/7 weeks of temporary total disability payments at $100 per week	$1228.60
(2) For 5% loss of a leg (loss of leg = 288 weeks) or 14.4 weeks at $100 per week	1440.00
	$2668.60

(e) Should the Federal Act apply, the Respondents will owe to Claimant the following additional amounts:

(1) For temporary total disability	$ 410.20
(2) For permanent partial disability	780.00
	$1190.20

(f) The Respondents have paid all of Claimant's medical and hospital bills and Claimant makes claim for no other sum.

Conclusion of Law

Claimant is not entitled to receive compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act because his injury did not occur upon the navigable waters of the United States as required by Section 3(a) of the Act and therefore this claim is not within the jurisdiction of the Act.

Opinion

Section 3(a) reads in applicable part:

> Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*).

The underlined language was added by the amendments to the Act which became effective on November 26, 1972. What is meant by the term "navigable waters" as expanded by the amendment is not patently clear. In order to gain some insight into the problems faced in this area, it will be helpful to review the background of this language which has been the subject of numerous decisions by the United

States Supreme Court and other Federal Courts[1] and several fine law review discussions.[2]

State Workmen's Compensation Laws began developing in the early twentieth century. One of the first statutes to be enacted was the New York Act of 1910. Other states rapidly followed suit and by 1920 all but eight states had adopted compensation statutes. In 1917, the Supreme Court held in *Southern Pacific Co.* v. *Jensen, supra,* that the New York State Workmen's Compensation Act could not be constitutionaly applied to a stevedore who was injured while unloading cargo aboard a ship docked at a New York pier. The court held that the stevedore's work was maritime in nature; that exclusive jurisdiction

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[1] Important decisions with respect to this section include *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205 (1917); *Knickerbocker Ice Co.* v. *Stewart,* 253 U.S. 149 (1920); *Washington* v. *W. C. Dawson Co.,* 264 U.S. 219 (1924); *Swanson* v. *Marra Bros., Inc.,* 328 U.S. 1 (1946); *Parker* v. *Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Davis* v. *Department of Labor,* 317 U.S. 249 (1942); *Calbeck* v. *Travelers Insurance Co.,* 370 U.S. 114 (1962); *Michigan Mutual Liability Co.* v. *Arrien,* 344 F.2d 640 (2d Cir. 1965); *Travelers Insurance Co.* v. *McManigal,* 139 F.2d 949 (1944); *Travelers Insurance Co.* v. *Branham,* 136 F.2d 873 (1943); *Minnie* v. *Port Huron Terminal Co.,* 295 U.S. 647 (1935); *Marine Stevedoring Corp.* v. *Oosting,* 398 F.2d 900 (1968); *Nacirema Operating Co., Inc.* v. *Johnson,* 396 U.S. 212 (1969); *T. Smith & Son, Inc.* v. *Taylor,* 276 U.S. 179 (1928).

[2] Larson, *The Conflict of Laws Problem Between the Longshoremen's Act and State Workmen's Compensation Acts,* 45, Southern California Law Review, 699 (1972); Smith, *On the Waterfront at the Piers Edge; Longshoremen's and Harbor Workers' Compensation Act,* 56 Cornell Law Review 114 (1970).

for all civil maritime cases was vested in the Federal District Courts; that the constitution vested this power within the Federal Government to promote uniformity in maritime matters; that freedom of navigation between the states would be impaired by state regulation; and, as a result, the New York legislature exceeded its authority in attempting to extend its workmen's compensation statute to stevedores working aboard ships.

The Jensen decision left many thousands of longshoremen without workmen's compensation remedies. Within five months, Congress enacted a law which attempted to give to injured maritime employees, "the rights and remedies under the workmen's compensation law of any State."[3] This act was declared unconstitutional in *Knickerbocker Ice Co.* v. *Stewart, supra.* The Supreme Court held that the Constitution intended to grant direct control over maritime commerce to the Federal Government and Congress could not delegate this power to the states. In 1922, Congress again attempted to enable maritime employees to be covered under state statutes but two years later in *Washington* v. *W. C. Dawson Co., supra,* the Supreme Court held that Congress had the power to "permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several states." These decisions left Congress with no alternative but to enact a federal workmen's compensa-

[3] 40 Stat. 395.

tion statute. Enter the Longshoremen's and Harbor Workers' Compensation Act of 1927. The original language of Section 3(a) covered injuries upon navigable waters of the United States and specifically included dry docks. However recovery was conditioned upon a lack of recovery under state laws.[4]

The result of this language was to cause many inequities and anomalies. A longshoreman would be covered while he worked on a ship but the moment he stepped onto a dock, even though he performed the same work on land, he walked out of the federal act and into state coverage. The same employee could walk in and out of the federal act hundreds of times a day. Unlike most other compensation provisions, coverage was not merely based upon whether the work was in the course of the employee's employment. If he happened to be working on a ship or over navigable waters, he was covered by the federal act; if he happened to be working on land, he was covered by a state act even though in both cases he worked for the same employer and performed the same work in the course of his employment. The

[4] "Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

Taylor[5] and *Minnie*[6] cases graphically demonstrate the inequities of this rule. In the *Taylor* case, the injured longshoreman was knocked from the dock into navigable water by a crane operated from a vessel. He was held to be covered under the state act because the impact that caused his injury occurred on land even though he landed on water. In the *Minnie* case the facts were reversed. The longshoreman was struck by a crane operated from land and was knocked from the deck of the vessel onto land. Since the blow that injured him occurred at sea even though he was knocked onto land, the Supreme Court held that he was covered by the federal act.

No small amount of confusion ensued as to whether at the time that he was injured, the employee was located at a point in which the federal act would apply or the state act would apply. In *Davis* v. *Department of Labor, supra,* Justice Black stated that there existed a twilight zone, "that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation" and that decisions as to whether federal or state law applied would have to be made on a case by case basis in an effort to balance state and federal interests. In *Calbeck* v. *Travelers Insurance Company, supra,* the court attempted to clarify the confusion by holding that Federal jurisdiction does not depend upon the fact that the employee is not covered by a state act. The effect was to create a zone of concurrent jurisdiction in

[5] *T. Smith & Son, Inc.* v. *Taylor, supra.*

[6] *Minnie* v. *Port Huron Terminal Co., supra.*

which either a state act or the federal act could provide coverage.

Although injuries that occurred on land were not covered by the federal act, injuries that occurred on dry docks were covered even as in *Travelers Insurance Co.* v. *Branham, supra,* when the dry dock was only 5% completed at the time of the accident. In attempting to construe the act liberally the courts have held that injuries on barges were covered even as in *Holland* v. *Harrison Bros. Dry Dock and Repair Yard, Inc.*, 306 F.2d 369 (5th Cir. 1962) where the barge was on a marine railway and the employee had both feet on dry land. In *Swanson* v. *Marra Bros., Inc., supra,* a longshoreman who was working on a pier loading a ship alongside was struck and injured by a life raft that fell from the vessel. The court denied relief under the Jones Act and indicated that the claim would also have been dismissed if it had been brought under the Longshoremen's Act since it occurred on shore and not over navigable waters. In *Michigan Mutual Liability Co.* v. *Arrien, supra,* a stevedore was working on a "skid," a removable wooden platform extending over water between the vessel and wharf when he was hit by a barrel that fell from the ship that he was helping to unload. The court held that the federal act was intended to cover injuries on skids or gangplanks since these were over navigable waters.

The last important decision was *Nacirema Operating Co., Inc.* v. *Johnson, supra.* That case was decided by the United States Court of Appeals, Fourth

Circuit, under the title of *Marine Stevedoring Corporation* v. *Oosting, supra,* in 1969. Judge Sobeloff speaking for the majority concluded that Congress desired the act to be status oriented, "reaching all injuries sustained by longshoremen in the course of their employment." He held that this was true regardless of the situs of the injury. In a vigorous dissent Chief Judge Haynsworth stated that although the Act was intended to be liberally construed "to achieve its purpose but not pervert it." He concluded that jurisdiction of the Act depended upon where the injury occurred even though this created the apparent inequity of having the same employee who works part of the time on the ship and part of the time on the dock passing from one jurisdiction to another many times during the same day.

The Supreme Court heard the case under the title of *Nacirema Operating Co., Inc.* v. *Johnson* and Justice White writing for the majority, disagreed with the lower court. The Supreme Court upheld the traditional view that injuries over water are compensable and those over the land are not within the jurisdiction of this act. It further held that wharfs and piers permanently affixed to land are extensions of land and injuries which occur on such structures are not within the jurisdiction of the longshore act.

The artificial distinction between whether the longshoreman who is doing the same work happens to be standing on land or over water at the time that he was injured created obvious inequities. It has been argued that the men are exposed to the same dangers

doing the same work and therefore should receive the same coverage and that not knowing whether the state or the federal law applies presents confusion. Many examples can be cited to show how ludicrous the situation can be. One that comes to mind is that two employees carrying a wooden beam, one employee being on the ship and the other on shore, when the beam is struck by a falling object and in turn strikes and injures both longshoremen. Although their injuries occurred as a result of the same incident as a result of their exposure to harm from the same danger, the employee who was on the ship would be over navigable waters and would receive benefits under the federal act while the employee who by fortuitous circumstances was standing on land would be covered by the state act. In most cases, state benefits are substantially less than those of the federal act. Writing about inequitable situations in 1970 in the law review article referred to in footnote 2, Professor Smith stated that, "the nation's 100,000 longshoremen and harbor workers continue to be the victims of two pernicious forms of neglect—judicial irresponsibility and legislative passivity."

But Congress was not passive for long. In 1971, Congressional hearings began with regard to proposed amendments and the Act was amended effective November 26, 1972. The amendments were sweeping. Employees benefits were increased. The amended Act provided that hearings would be conducted in accordance with the Administrative Procedure Act and this resulted in longshore hearings

before administrative law judges for the first time. A controversial unseeworthiness third party remedy was eliminated. And with respect to the issues in point, language was added to Section 3(a) to expand the definition of navigable waters to include areas on land.

With this background in focus and with cognizance of the confusion and past problems with respect to coverage under Section 3(a) of the Act, the question presented is whether in amending that provision Congress intended to amplify the Act's coverage to include all employees whose injuries arose out of and occurred in the course of their employment as longshoremen regardless of where they were injured.

Section 2 of the amended Act contained an expanded definition of covered employees. It specifically included ship repairmen, which was Mr. Perdue's occupation. Therefore, there is no question that Claimant was an employee covered by the Act. Similarly, there is no question that this Employer falls within Section 2's definition of an "employer."

There is also no question that Claimant's injury arose out of and was within the course of his employment. He was on company time. He was on his way to "punch out." He was transported in a company vehicle for the convenience of his Employer to "punch out" at that particular office. Thus, if coverage is grounded upon a covered employee, employed by a covered employer whose injury arose out of and occurred within the course of his employment, clearly Claimant falls within the Act's jurisdiction.

Despite this, I do not believe that an analysis of the Act's language or its legislative history upholds the conclusion that Congress intended to ground coverage upon the sole criterion of whether the injury arose out of and occurred in the course of a covered worker's employment. I am aware that this is a humanitarian statute and that the decisions are legion that it should be liberally construed. However liberal construction does not mean blinding oneself to the realities of the facts and the law.

In reaching my conclusion, I have also considered the views of the Solicitor of the United States Department of Labor.[7] I fully appreciate that during the long history of the Act many inequities were caused by a longshoreman walking in and out of the Act's coverage and that an interpretation that the Act still does not cover all longshoremen whose injuries arose out of and in the course of employment will lead to cases in which the same employee is covered by a state act on some occasions and by the federal act at other times.

I have also taken into consideration Proposed Rules of the Department of Labor issued on May 17, 1974 and published in Vol. 39, No. 101 of the Federal Register on May 23, 1974 which urge that the Act be interpreted liberally.

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[7] Although the Solicitor did not submit a brief in this case, in a case involving a similar issue, *O'Leary* v. *Southeast Seattle Stevedoring Corp. and Liberty Mutual Insurance Company*, the Solicitor filed a brief covering essentially the same issue.

I did not find the legislative history which I have reviewed in detail to be determinative of Congress' intent with respect to this section.

The Senate Committee on Labor and Public Welfare set forth its rationale for expanded provisions as follows:

> Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.
>
> * * * * *
>
> The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.
>
> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example,

> cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in loading or unloading of cargo. However, checkers, for example, who were directly involved in the unloading or loading functions are covered for the new amendment." S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972), pp. 12, 13 (Legislative History, *supra*, pp. 74, 75).

Thus, the legislative history, although addressing itself to some past inequities does not cover the question of whether all injuries to longshoremen, regardless of where they occurred, are compensable. If the Act now covers all specified employees who are injured in the course of their employment, then a longshoreman who is dispatched by his employer to buy nails at a hardware store miles from the pier would be covered by the Act for injuries that he sustained

in an automobile accident on a highway during this mission. I do not believe that this was the intent of Congress. I believe that the uniformity that was referred to in the legislative history—the uniformity that Congress intended to achieve—was uniformity of coverage of longshoremen and other defined employees while they were actively engaged in pursuing their normal duties. Longshore work has been long considered to be an extremely hazardous form of employment.[8] Obviously Congress did not feel that an employee who was loading or unloading a vessel was exposed to less hazards whi[illegible] he stood on land than when he stood on a ship. The hazards and risks of longshoring activities were the same; and I think

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[8] As has been noted in many decisions, including most recently *Victory Carriers* v. *Law*, 404 U.S. 217, 92 S.Ct. 418 (1971), stevedoring is one of the most accident-prone professions in American industry. According to the National Academy of Sciences-National Research Council, Maritime Cargo Transportation Conference, Longshore Safety Survey 22-23 (1956) hazardous industries have the following accident frequency rates:

Stevedoring	92.3 per million man hours worked
Logging	74.3
Structural Steel Erection	47.5
Saw and Planing Mills	42.0
General Building	37.0

See also New York Shipping Assn., Safety Bureau, Annual Accidents (1965).

that the hazards of longshore work were those for which Congress intended to provide coverage under the Act.

Although the definition of navigable waters in Section 3 has been expanded greatly, nevertheless the provision sets forth specified areas. The area at which this Claimant was injured does not fall within these areas. I attach considerable weight to the use of the word "adjoining," in Section 3(a). This word has a clear and precise meaning. *Bouvier's Law Dictionary*, 3rd Edition (1914), contains the following definition:

> The word in its etymological sense, means touching or contiguous, as distinguished from lying near or adjacent.

Black's Law Dictionary, Revised Fourth Edition (1968), contains a similar definition:

> The word in its etymological sense means touching or contiguous, as distinguished from lying near to or adjacent. . . . To be in contact with; to abut upon. . . . And the same meaning has been given to it when used in statutes.

On the same page of each of these dictionaries is the word "adjacent." That word has been defined as "Lying near or close to; sometimes contiguous; neighboring" in *Black's Law Dictionary, supra*, and as "Next to, or near, neighboring" in *Bouvier's Law Dictionary, supra*.

That Congress, which is composed of many fine lawyers, with excellent legal assistance at its disposal and considerable expertise in the use of the English language, chose to use the word "adjoining" rather than "adjacent" must be interpreted to indicate that it intended that the defined areas would touch, be contiguous to or abut upon navigable waters.

Claimant clearly was not injured on a pier, wharf, dry dock, building way, or marine railway. Was he injured in an "other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel"? Even if the office that the employer used for checking out his employees could, by liberal definition, be defined as an "area customarily used for loading, unloading, repairing or building a vessel" by arguing that the process of "punching out" was intricately intertwined with the tasks of loading and unloading, etc. of vessels, thereby making the office fall within a defined area, (1) the office was not an adjoining area since approximately one mile of land which belonged to the naval installation spanned the distance between the office and the normal loading area, (2) Claimant was not injured within the confines of the office—he was injured on this land which, although part of the naval station was in no way used for loading, unloading, repairing or building a vessel.

It can be argued that the use of the word "including," in the beginning of the parenthetical material, supports a conclusion that not only can the specified areas be covered but all other areas in which the em-

ployee sustained an injury which arose out of and occurred in the course of his employment. I do not believe that this is the correct interpretation. Certainly the use of "including" in legislation means that more than the specified language is covered. However, *ejusdem generis* principle of statutory construction would operate to provide that if the area was not a specified area it would be another adjoining area of the type that would be used for the longshoreman's work in connection with the loading, unloading, repairing or building of a vessel.

One specified term to which careful scrutiny must be given is "terminal." Can it be concluded that "terminal" includes the entire facility or installation on which longshore work is performed or is the term to be defined more restrictively? *Webster's Third New International Dictionary*, S&C Merriam Co., 1961, defines the word as:

> Either end of a carrier line (as a railroad, trucking or shipping line, or airline) with classifying yards, dock and lighterage facilities, management offices, storage sheds and freight and passenger stations.

As applied to railroads the term has usually been interpreted to indicate:

> . . . a place provided by or for common carriers, whether by land, water, or air, for the purpose of receiving and discharging passengers or for the purpose of receiving and delivering freight, including buildings and structures incidental to those purposes, such as shelters or enclosures for

> the convenience and comfort of passengers or for the care and safety of freight pending shipment and delivery to consignees or connecting carriers, and does not include storage warehouses wherein space is to be rented to customers for definite periods of time for the permanent storage of goods, wares, and merchandise until used or disposed of in the usual course of business. *Beazley* v. *DeKalb County*, 210 Ga. 41, 77 S.E.2d 740 (1953).[9]

These definitions lead to the conclusion that as used in Section 3(a), "terminal" means that area near the docks that has to do with the loading, unloading, receipt or shipment of cargo but does not extend to the entire installation. A military installation such as the Mayport Naval Station or a large industrial shoreside complex can extend for many, many miles, much of which may have nothing to do with loading, unloading or shipping of cargo. Obviously this other area is not a terminal within the generally accepted definitions of the term and it is a basic canon of statutory interpretation that language will be deemed to be used in statutes in its ordinary sense in the absence of a contrary indication by the legislature.

The location of the word, "terminal" in the section also belies interpretations of grandeur. It is sandwiched between specifically defined, limited areas, coming after "pier, wharf, dry dock" and before "building way, marine railway." If "terminal" included the entire facility, it would not only logically be more appropriately set at the end of the phrase, and would probably also render all other specific terms superfluous.

[9] This interpretation concurs with the definition for railroad terminals in *74 CJS Railroads*, § 1, p. 332.

Finally, by applying the rule of *ejusdem generis* in reverse, a more limited interpretation of the word "terminal" gains further support. This principle is that where a general phrase follows specifically listed words, language in the general phrase helps to define the meaning of specified terms.

Thus in *United States* v. *Standard Brewery*, 251 U.S. 210 (1920) Mr. Justice Day rejected a Government argument that the statutory language, "no grains, cereals, fruit, or other good product shall be used in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes" applied to all wine and beer whether intoxicating or not. The Court held:

> The prohibitions extend to the use of food products for making "beer, wine, or other intoxicating malt or vinous liquors for beverage purposes." These provisions are of plain import and are aimed only at intoxicating beverages. It is elementary that all of the words used in a legislative act are to be given force and meaning (Washington Market Co. v. Hoffman, 101 U.S. 112, 115, 25 L. ed. 782, 783); and of course the qualifying words "other intoxicating" in this act cannot be rejected. It is not to be assumed that Congress had no purpose in inserting them, or that it did so without intending that they should be given due force and effect.

Applying this rule to the general language in Section 3(a) of the Act—". . . or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel . . ."—the definition of "terminal" would require that the area defined as a terminal area be customarily used for loading, unloading, building, or repairing a vessel. This is consistent with the definition in *Beazley* v. *DeKalb County, supra,* and *Corpus Juris Secundum supra,* which exclude from the meaning of the word such areas as storage warehouses used for permanent storage of goods. Mayport Naval Station is a military installation which includes areas such as the locus of Claimant's injury which have nothing to do with loading, unloading, building or repairing vessels. Such areas are not terminal areas within the meaning of Section 3(a).

Also, I cannot help but conclude that had Congress intended to cover all injuries that arose out of and occurred in the course of a longshoreman's employment it could have used such words or similar language rather than the words actually employed. Thus in the *Outer Continental Shelf Land Act,* 43 U.S.C. 1333(b), Congress imposed jurisdiction in "cases and controversy arising out of or in connection with any operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline natural resources, or involving the rights to the natural resources of the sub-soil and sea bed of the Outer Continental Shelf. . . ."

In the *Federal Employers Liability Act,* 45 U.S.C. 51, Congress enacted the following language:

> "Every common carrier . . . shall be liable for damages to any person suffering injury while he is employed by such carrier in such commerce. . . ."

It is unnecessary to recount more instances. The point is quite clear. Congress is capable of saying what it means. The fact that language such as arising out of and in the course of employment was not used as the sole criterion indicates an intent to provide for a more restrictive coverage. This can be explained by the fact that a longshoreman working at his normal duties is exposed to considerable hazards and the hazards do not necessarily change whether he is over water or on land. However, when the same employee does not actively engage in loading, unloading, repairing a vessel, etc., the hazards are substantially reduced. Thus, a longshoreman such as Claimant who injures himself by stepping into a depression in the street is no less vulnerable than any other employee who happens to step into such a depression. Similarly a longshoreman who is injured while driving a car on an errand for his employer is exposed to no greater risks than a nonlongshoring employee who is injured in an automobile accident.

Whether or not it would have been more desirable from the point of view of simplicty or fairness to provide coverage to longshoremen regardless of where they happened to be when injured is not the question.

The issue is whether this can be read into Section 3 (a)'s language on the basis of legislative intent, logic and the meaning of the language employed. As has been indicated, the application of these criteria leads to the inescapable conclusion that the area in which this Claimant was injured was not an area used for loading, unloading, repairing or building a vessel as specified and described in Section 3(a). Therefore this claim is not within the jurisdiction of and not compensable under the Longshoremen's and Harbor Workers' Compensation Act.

Order

For the reasons set forth above, this claim is denied.

Edwin S. Bernstein
EDWIN S. BERNSTEIN
ADMINISTRATIVE LAW JUDGE

Dated: September 19, 1974
Washington, D.C.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1978

No. 75-1659

Docket No. BRB 74-200

JACKSONVILLE SHIPYARDS, INC., AND
AETNA CASUALTY AND SURETY COMPANY, PETITIONERS

versus

HERBERT L. PERDUE AND DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
U.S. DEPARTMENT OF LABOR, RESPONDENTS

Petition for Review of an Order of the
Benefits Review Board

JUDGMENT

Before:

TUTTLE, THORNBERRY AND TJOFLAT, *Circuit Judges.**

This cause came on to be reconsidered on remand following the vacation of this Court's judgment by

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* Judge Thornberry was a member of the panel that heard oral arguments but due to illness did not participate in this decision. 28 U.S.C. § 46(d) (1970).

the Supreme Court of the United States; and on further briefs of the parties;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged that the original decision of this Court entered on September 27, 1976 is reaffirmed; and that the order of the Benefits Review Board appealed from is reversed;

It is further ordered that respondents pay to petitioners, the costs on appeal to be taxed by the Clerk of this Court.

June 16, 1978

Issued as Mandate: SEP 7 1978

APPENDIX F

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

New Orleans, La., August 30, 1978.

No. 75-1659—*Jacksonville Shipyards, Inc. and Aetna Casualty & Surety Company* v. *Herbert L. Perdue and Director, Office of Workers' Compensation Programs, United States Department of Labor.*

DEAR COUNSEL: This is to advise that an order has this day been entered denying the petition ( ) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk.

BRENDA M. HAUCK,
Deputy Clerk.

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